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No. 04-637

IN THE
Supreme Court of the United States

MARGARET BRADSHAW, Warden
Petitioner,
v.
JOHN DAVID STUMPF,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the
Sixth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT

A Prosecutor's Use of Inconsistent Arguments for the Same Crime in Different Trials Violates the Due Process Clause of the Fourteenth Amendment 3

A. The Same Prosecutor Who Uses Inconsistent Arguments for the Same Crime Deprives the Accused of "Fundamental Fairness" in the Judicial Process 3

B. A Prosecutor's Use of Inconsistent Theories for the Culpability of More than One Defendant for the Same Crime Violates Due Process Because It Disregards the Prosecutor's Duty to Seek Justice and Truth 7

C. Due Process Necessitates Reliability at Sentencing, Which is Precluded When the Government Advances Irreconcilable Inconsistent Theories for More than One Defendant for the Same Crime 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES **Pages**

Alcorta v. Texas, 355 U.S. 28, 31 (1957) 10
Banks v. Dretke, 540 U.S. 668 (2004) 10
Berger v. United States, 295 U.S. 78, 88 (1935) 3, 8
Brady v. Maryland, 373 U.S. 83, 87 (1963) 5, 10
Caldwell v. Mississippi, 472 U.S. 320 (1985) 5, 10
Crawford v. Washington, 541 U.S. 36,
124 S.Ct. 1354, 1374 (2004) 11
Drake v. Kemp, 762 F.2d 1449, 1479 (11th Cir. 1985) 7
Giglio v. United States, 405 U.S. 150 (1972) 4, 5
Giles v. Maryland, 386 U.S. 66, 98 (1967) 8
Green v. Georgia, 442 U.S. 95 (1979) 5
Gregg v. Georgia, 428 U.S. 153, 190 (1976) 10
In re Sakarias, 2005 WL 486783 *13 (March 3, 2005) 7
In Re Winship, 397 U.S. 358, 369 (1970) 3
Miller v. Pate, 386 U.S. 1 (1967) 5
Mooney v. Holohan, 294 U.S. 103 (1935) 4
Morine v. Burdine, 475 U.S. 412, 467 (1986) 11
Napue v. Illinois, 360 U.S. 264 (1959) 4
State v. Sha, 292 Minn. 182, 185 (1972) 8
Stumpf v. Mitchell, 367 F.3d 594, 611 (6th Cir. 2004) .. 6, 7
Thompson v. Calderon, 120 F.3d 1045, 1059
(8th Cir. 2000) 7
United States v. Jaramillo, 69 F.3d 388 (9th Cir. 1995) ... 6
United States v. Kattar 840 F.2d 118, 127 (1st Cir. 1988) . 7
United States v. Lovasco, 431 U.S. 783, 790 (1977) 3
United States v. Wade, 388 U.S. 218, 256 (1967) 4
Wiggins v. Smith, 539 U.S. 510 (2003) 10
Woodson v. North Carolina, 428 U.S. 280 (1976) 11

STATUTE **Pages**

18 U.S.C. § 1623 6

MISCELLANEOUS **Pages**

ABA Model Rules of Professional Conduct,
Rule 1.6 (2003) 9
Rule 3.1 (2003) 9
Rule 3.3 (2003) 8
Rule 3.3, Comments 2, 5 (2003) 8, 9
Rule 3.8, Comment 1 (1983) 7, 9
ABA Standards for Criminal Justice,
Prosecution Function § 3-1.2 (1992) 7
Prosecution Function § 3-2.8 (1992) 9
Prosecution Function § 3-5.6 (1992) 9
Prosecution Function § 3-6.1 (1992) 9
ABA Model Code of Professional Responsibility
EC 7-13 (1981) 8
Ohio Rules of Court: Code of Professional Responsibility
EC 7-13 (2002) 8

Bennett L. Gershman, *The Prosecutor's Duty to the Truth*,
14 GEO. J. LEGAL ETHICS 309 (2001) 7, 8
Bruce A. Green, *Why Should Prosecutor's "Seek Justice,"*
26 FORDHAM URB. L.J. 607, 612 - 619 (1999) 7
Anne Bowen Poulin, *Prosecutorial Inconsistency,*
Estoppel, and Due Process: Making the Prosecution
Get Its Story Straight, 89 CAL. L. REV. 1423 (2001) .. 4
Restatement (Third) of the Law Governing
Lawyers § 97(3) (2000) 8

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 12,200 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure fairness and the proper administration of criminal justice. One of its particular concerns is to ensure due process for persons accused of crime. Due process mandates that prosecutors proceed with fairness in the pursuit of justice.

SUMMARY OF ARGUMENT

A prosecutor who presents "flip-flopping" theories concerning the same crime deprives an accused of "fundamental fairness," an essential ingredient of the due process clause of the Fourteenth Amendment. This deprivation

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[1] The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus*, its members, or counsel contributed money or services to the preparation or submission of this brief.

is exacerbated when the *same* prosecutor argues inconsistently as to the identity of a single triggerman in a *death penalty* case. The egregiousness of this conduct is also heightened when the statements are not being made to an identical factfinder who might be able to evaluate the credibility of these different positions.

Prosecutors have a unique role in the judicial process. They represent the interests of the sovereign, and thus, have a heightened responsibility to ensure that fairness is achieved and a defendant's due process rights are protected. This cannot be accomplished when prosecutorial veracity is ignored. Both case law and ethical mandates provide a measure for determining appropriate lines of fairness. When a prosecutor points one finger at two different individuals as the culpable party in a single triggerman case, the inconsistency presented severely breaches accepted norms of prosecutorial fairness and is offensive to providing integrity in the judicial process.

Due process mandates that a sentence be fair and reliable in any given case. That protection is amplified in capital cases because of the readily cognizable difference in the nature of a death sentence as compared to any other sentence. To punish two individuals based upon statements that can be accurate as to only one of them, flies in the face of sentencing reliability.

ARGUMENT

A Prosecutor's Use of Inconsistent Arguments for the Same Crime in Different Trials Violates the Due Process Clause of the Fourteenth Amendment

A. The Same Prosecutor Who Uses Inconsistent Arguments for the Same Crime Deprives the Accused of "Fundamental Fairness" in the Judicial Process

Due process protects the accused from actions that violate "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *United States v. Lovasco,* 431 U.S. 783, 790 (1977) (citations omitted). The requirement of "fundamental fairness" is a core value "embodied in the Due Process Clause of the Fourteenth Amendment." *In Re Winship*, 397 U.S. 358, 369 (1970) (Harlan J., concurring).

Prosecutors serve a unique role in assuring that an accused receives "fair play and decency" in the judicial process. As opposed to being "an ordinary party to a controversy," it is the prosecutor who serves as a critical "representative" of the "sovereignty," which has the "obligation to govern impartially." *Berger v. United States*, 295 U.S. 78, 88 (1935). "In a criminal prosecution," the prosecutor's role "is not that it shall win a case, but that justice shall be done." *Id.* "It is as much his [or her] duty to refrain from improper methods calculated to

produce a wrongful conviction as it is *to use every legitimate means to bring about a just one.*" *Id.* (emphasis added).[2]

This Court has recognized an array of improper prosecutorial conduct as depriving a defendant of "fundamental fairness" in the criminal process. Specifically, the jurisprudence of this Court prohibits the presentation of, or failure to correct, false testimony, and the presentation of improper argument by the prosecutor. *See generally* Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423 (2001). These two limitations on prosecutors demonstrate a clear recognition that "fundamental fairness" cannot be achieved when a prosecutor fails to offer reliable evidence or makes statements that misrepresent the truth.

Prosecutors violate due process by presenting material testimony that is false, by presenting material testimony that creates a false impression, or allowing such testimony to stand uncorrected. *See, e.g., Mooney v. Holohan*, 294 U.S. 103 (1935) (presenting knowingly false testimony violates due process); *Giglio v. United States*, 405 U.S. 150 (1972) (failing to correct false testimony violates due process); *Napue v. Illinois*, 360 U.S. 264 (1959) (failing to correct testimony that creates a false impression, though not perjured, violates due process). This is true even where the particular prosecutor does not know that the testimony being presented is false. *See Giglio v. United*

[2] *See also United States v. Wade*, 388 U.S. 218, 256 (1967) (White J., concurring) ("Law enforcement officers have the obligation to convict the guilty and make sure they do not convict the innocent.").

States, 405 U.S. 150 (1972). The reliability of a conviction and its accompanying sentence[3] cannot be assured when a prosecutor engages in conduct that is antithetical to a truthful process. The truthfulness of the process is of the utmost importance even when a specific prosecutor acts in good faith. *Id.* at 153. As this Court stated in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."

The importance of prosecutorial veracity, as a core value encompassed within due process, is also demonstrated in decisions by this Court that hold that a prosecutor's improper argument can violate the due process rights of a defendant. *Miller v. Pate*, 386 U.S. 1 (1967) (finding that a deliberate misrepresentation of truth to a jury is a violation of due process); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding an uncorrected, misleading statement of law to a jury a violation of due process).

Collectively, the improper argument and false testimony decisions of this Court set a clear standard for the proposition that uncorrected false statements by a prosecutor create an unacceptably high risk to the integrity of the judicial process. A false statement by the prosecutor, while not evidence, can still be sufficient to violate the due process rights of the defendant. Inconsistent statements by a prosecutor falls within this same class of improprieties because it demeans the reliability of the

[3] Due process requires fairness not only for the trial phase of a case, but also for sentencing. *See Green v. Georgia*, 442 U.S. 95 (1979).

judicial process.[4] Mutually exclusive prosecutorial theories advanced against co-defendants in separate trials are every bit as much of a threat to the "fundamental fairness" of the criminal process as false testimony, and are, essentially, tantamount to improper argument and the introduction of false evidence.

The holding by the Sixth Circuit majority of this case, that it violates due process for a prosecutor to advance inconsistent irreconcilable theories, is not an aberration, as other jurisdictions have endorsed this position. *See Stumpf v. Mitchell*, 367 F.3d 594, 611 (6th Cir. 2004) (discussing sister circuits that have held the same or similar conduct a violation of due process). In endorsing the position of two prior decisions, the lower court stated:

> The prosecutor's theories of the same crime in the two different trials negate one another. They are totally inconsistent. This flip flopping of theories of the offense was inherently unfair. Under the peculiar facts of this case the actions by the prosecutor violate the fundamental fairness essential to the very concept of justice...The state cannot divide and conquer in this manner. Such actions reduce criminal trials to mere gamesmanship and rob them of their supposed search for the truth.

[4] The disdain for inconsistent statements in the judicial process is seen in another setting which makes it a federal crime to offer inconsistent declarations in certain circumstances. *See United States v. Jaramillo*, 69 F.3d 388 (9th Cir. 1995) (discussing inconsistent statements within the scope of 18 U.S.C. § 1623).

Id. at 612-613 (citing *Thompson v. Calderon*, 120 F.3d 1045, 1059 (8th Cir. 2000); quoting *Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring)).

B. A Prosecutor's Use of Inconsistent Theories for the Culpability of More than One Defendant for the Same Crime Violates Due Process Because It Disregards the Prosecutor's Duty to Seek Justice and Truth

The Supreme Court of California recently held a prosecutor's use of inconsistent and irreconcilable theories was a due process violation. The Court noted how this prosecutorial conduct is "inconsistent with the principles of public prosecution." *In re Sakarias*, 2005 WL 486783 *13 (March 3, 2005). The *Sakarias* Court states that "[a] criminal prosecutor's function 'is not merely to prosecute crimes, but also to make certain that the truth is honored to the fullest extent possible during the course of the criminal prosecution and trial.'" *Id.* at *13. (quoting *United States v. Kattar* 840 F.2d 118, 127 (1st Cir. 1988)).

"A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (1983), *see also* ABA Standards for Criminal Justice, Prosecution Function § 3-1.2 (1992). This prosecutorial duty is founded in both ethical[5]

[5] The prosecutor's duty to "seek justice" is well grounded in legal literature. *See* Bruce A. Green, *Why Should Prosecutor's "Seek Justice,"* 26 FORDHAM URB. L.J. 607, 612 - 619 (1999) (providing a historical outline of the prosecutor's duty to "seek justice"); Bennett L. Gershman,

and legal standards. The concept stems from the idea that a prosecutor is a representative of the sovereign whose obligation it is to govern impartially. *Berger v. U.S.* 295 U.S. 78, 88 (1935). As a representative of the sovereign, the prosecutor has a duty to use restraint and prosecute cases fairly. ABA Model Code of Professional Responsibility EC 7-13 (1981); Ohio Rules of Court: Code of Professional Responsibility EC 7-13 (2002).[6]

Prosecutors, as "ministers of justice," have the obligation to seek truth. As stated in *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J. concurring), "[t]he State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment." Regardless of the evidence against the accused, a prosecutor has an overriding duty of fairness. *State v. Sha*, 292 Minn. 182, 185 (1972).

Prosecutors have obligations beyond those of most lawyers, who are clearly prohibited from knowingly making false statements of fact to the court (ABA Model Rules of Professional Conduct, Rule 3.3 (2003)), and are prohibited from allowing false evidence to be presented that misleads the court. (ABA Model Rules of Professional Conduct, Rule 3.3

The Prosecutor's Duty to the Truth, 14 GEO. J. LEGAL ETHICS 309 (2001).

[6] Unlike lawyers in private practice, "a prosecutor or similar lawyer determining whether to file criminal proceedings or take other steps in such proceedings, must do so only when based on probable cause and the lawyer's belief, formed after due investigation, that there are good factual and legal grounds to support the step taken." Restatement (Third) of the Law Governing Lawyers § 97(3) (2000).

Comments 2, 5 (2003)). Not only are lawyers prohibited from bringing forward evidence that may appear to be false, but they must have a basis in fact for any actions they bring or defend. ABA Model Rules of Professional Conduct, Rule 3.1 (2003). Unlike defense counsel who may have obligations of confidentiality to a client, (ABA Model Rules of Professional Conduct, Rule 1.6 (2003)), and constitutional mandates that are provided to an accused, the prosecutor serves as the representative of the sovereign.

A prosecutor's duty is to make sure that defendants' rights are protected and that convictions are based on sufficient evidence. ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (2003). It is specifically reiterated in the prosecutor's functions that the prosecutor is not to misrepresent facts to the court (ABA Standards for Criminal Justice, Prosecution Function § 3-2.8 (1992)) and is to seek the withdrawal of false evidence upon its discovery. (ABA Standards for Criminal Justice, Prosecution Function § 3-5.6 (1992)). When prosecutors are involved in sentencing, they are supposed to ensure that a fair and informed judgment is made by the sentencing authority. ABA Standards for Criminal Justice, Prosecution Function § 3-6.1 (1992).

C. Due Process Necessitates Reliability at Sentencing Which is Precluded When the Government Advances Irreconcilable Inconsistent Theories for More than One Defendant for the Same Crime

Punishment premised upon inconsistent prosecutorial theories fails to provide accuracy in sentencing, an essential

aspect of assuring constitutional compliance with due process. This is particularly important when the sentence is death.

"[A]ccurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." *Gregg v. Georgia*, 428 U.S. 153, 190 (1976). "It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an *informed* manner." *Id.* at 189. (emphasis added). This Court has held that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* This principle of "guided discretion," intended to produce accuracy in sentencing, is thwarted when a prosecutor is allowed to present factually inconsistent theories of a crime.

Prosecutorial misleading is constitutionally impermissible irrespective of whether the conduct occurs at trial or at sentencing.[7] *See Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985); *see also Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (finding a due process violation when a prosecutor uses testimony that gives a "false impression" that may affect the imposition of a death sentence). Comments that improperly mislead a factfinder at the sentencing phase of a death case fail to provide reliability. In light of the often unchecked role served by prosecutors in the criminal justice process, it is necessary for this Court to speak definitively in prohibiting conduct that

[7] *See also Wiggins v. Smith*, 539 U.S. 510 (2003) (finding ineffective assistance of counsel due to failures *solely* in the sentencing phase); *Banks v. Dretke*, 540 U.S. 668 (2004) (applying prosecutor's duty to disclose *Brady* material in the context of sentencing).

demeans reliability. *See Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1374 (2004) (finding that confrontation was "the only indicium of reliability sufficient to satisfy constitutional demands").

In *Woodson v. North Carolina*, 428 U.S. 280 (1976), this Court explained why, particularly in capital cases, there is a greater need for reliability in the sentencing decision:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that *qualitative difference*, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

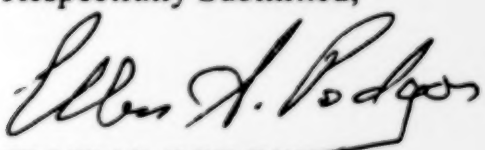
Id. at 305 (emphasis added).

Woodson underscores the precedential importance that this Court places on maintaining procedural safeguards in capital cases. When a prosecutor is allowed to present inconsistent and irreconcilable theories of culpability in successive proceedings, there is a heightened risk that an arbitrary sentencing decision will be reached. "[D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections." *Morine v. Burdine*, 475 U.S. 412, 467 (1986) (Stevens, J., dissenting).

CONCLUSION

For the foregoing reasons, NACDL urges this Court to affirm the judgment of the Court of Appeals.

Respectfully Submitted,



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